Time Dotcom Bhd v Al-Fazirul Abdullah & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–296 OF 2009
AZIAH ALI J
30 DECEMBER 2010

Labour Law — Employment — Probationer — Expert employed to head IT unit of applicant on probation — Expert also given other supervisory functions — Expert's employment terminated on ground IT unit to be closed down — Expert's other job functions not addressed — Whether applicant established expert's redundancy to justify dismissal — Whether applicant by conduct treated expert as confirmed employee — Whether Industrial Court's finding of dismissal without just cause or excuse proper

The applicant applied to the High Court for certiorari to quash an Industrial Court award that found the first respondent ('Al-Fazirul') had been dismissed from the applicant's employ without just cause or excuse. Al-Fazirul, who had 15 years' experience in information iechnology ('IT') was invited to join the applicant by its then Group Managing Director and appointed for a six-month probationary period as chief operating officer ('COO') of its business unit, Malaysian Integrated Data Centre ('MIDC'). He was given six months to inform the Group's Human Resources Department of his readiness to take over responsibility of MIDC from its incumbent head. Apart from his position in MIDC, Al-Fazirul was also tasked to oversee the applicant's IT division and two other projects. When he returned after a short stint abroad in connection with his work, Al-Fazirul found some of the applicant's top-level management officers had left. When he informed the applicant of his readiness to helm MIDC, he was, instead, informed by the applicant that it had decided to close down MIDC and that his employment as an 'unconfirmed probationer' was terminated with two weeks' salary in lieu of notice in accordance with his appointment letter. The Industrial Court found the applicant had, by conduct, treated Al-Fazirul as a confirmed employee and that it had failed to produce sufficient documentary proof that MIDC was not viable and had to be closed down. The court also found the managerial power to retrench was not exercised bona fide and that there was mala fide in the applicant's failure to give adequate notice to Al-Fazirul of its decision to close down MIDC and its failure to respond to Al-Fazirul's queries about his readiness to helm MIDC. The Industrial Court held the ground for Al-Fazirul's redundancy had not been established as he was not appointed solely for MIDC but was tasked to do other supervisory functions in the applicant company. The applicant had failed to

show what had happened to those other functions which were assigned to Al-Fazirul.

Held, dismissing the application with costs:

(1) The evidence of the minutes of the applicant's board meeting on 24 August 2001 showed the board acknowledged Al-Fazirul's status as a permanent employee. The Industrial Court, therefore, committed no error in finding that he was treated as a permanent employee (see paras 11(f) & 12).

(2) The Industrial Court had considered all the relevant facts and evidence in concluding that the applicant had failed to prove Al-Fazirul's redundancy to justify his dismissal. The court's findings were not irrational but were supported by evidence. No error of law was committed to warrant curial intervention (see para 17).

[Bahasa Malaysia summary

Pemohon memohon ke Mahkamah Tinggi untuk certiorari membatalkan award Mahkamah Perusahaan yang mendapati responden pertama ('Al-Fazirul') telah dibuang kerja daripada syarikat pemohon tanpa sebab dan alasan yang adil. Al-Fazirul, yang mempunyai pengalaman selama 15 tahun dalam teknologi informasi ('IT') dipelawa untuk bekerja dengan pemohon oleh Pengarah Urusan Kumpulan pada ketika itu dan dilantik untuk tempoh percubaan selama enam bulan sebagai ketua pegawai operasi ('COO') unit perniagaannya, Malaysian Integrated Data Centre ('MIDC'). Dia diberi enam bulan untuk memberitahu Jabatan Sumber Manusia Kumpulan mengenai kesediannya untuk mengambil alih tanggungjawab terhadap MIDC daripada ketua penjawat kininya. Selain daripada jawatannya di dalam MIDC, Al-Fazirul juga ditugaskan untuk menyelia bahagian IT pemohon dan dua projek lain. Apabila dia pulang selepas bertugas sekejap di luar negara yang berkaitan dengan kerjanya, Al-Fazirul mendapati sebahagian daripada pegawai-pegawai pengurusan peringkat atasan telah berhenti. Apabila dia memberitahu pemohon mengenai kesediannya untuk meneraju MIDC, dia sebaliknya diberitahu oleh pemohon bahawa pemohon memutuskan untuk menutup MIDC dan bahawa pekerjaannya sebagai 'unconfirmed probationer' ditamatkan dengan gaji dua bulan sebagai ganti notis mengikut surat pelantikannya. Mahkamah Perusahaan mendapati pemohon telah dengan tindakannya menganggap Al-Fazirul sebagai pekerja yang telah disahkan dan ia telah gagal untuk mengemukakan bukti dokumentar yang mencukupi bahawa MIDC tidak berdaya maju dan terpaksa ditutup. Mahkamah juga mendapati kuasa pengurus untuk membuang pekerja tidak dilaksanakan dengan bona fide dan terdapat mala fide di dalam kegagalan pemohon untuk memberi notis yang mencukupi kepada Al-Fazirul mengenai keputusannya untuk menutup MIDC dan kegagalannya untuk menjawab pertanyaan-pertanyaan Al-Fazirul mengenai kesediannya untuk meneraju MIDC. Mahkamah Perusahaan

memutuskan bahawa alasan untuk lebihan kerja Al-Fazirul tidak dibuktikan memandangkan dia bukan dilantik semata-mata untuk MIDC tetapi ditugaskan untuk menjalankan fungsi-fungsi penyeliaan lain di syarikat pemohon. Pemohon telah gagal untuk menunjukkan apa yang berlaku kepada fungis-fungsi lain tersebut yang telah diserahkan kepada Al-Fazirul.

Diputuskan, menolak permohonan dengan kos:

(1) Keterangan mengenai minit-minit mesyuarat lembaga pemohon pada 24 Ogos 2001 menunjukkan lembaga mengakui status Al-Fazirul sebagai pekerja tetap. Mahkamah Perusahaan, oleh itu, tidak melakukan kesilapan dalam dapatan bahawa dia dianggap sebagai pekerja tetap (lihat perenggan 11(f) & 12).

(2) Mahkamah Perusahaan telah mempertimbangkan kesemua fakta relevan dan keterangan dalam memutuskan yang pemohon telah gagal untuk membuktikan lebihan kerja Al-Fazirul untuk menjustifikasikan pembuangan kerjanya. Dapatan mahkamah bukan tidak rasional tetapi disokong oleh keterangan. Tiada kesilapan undang-undang dilakukan untuk mewajarkan campur tangan curial (lihat perenggan 17).]

Notes

For cases on probationer, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1216–1225.

Cases referred to

Abdul Majid bin Hj Nazardin & Ors v Paari Perumal [2002] 2 MLJ 640; [2002] 3 CLJ 133, CA (refd)

Goon Kwee Phoy v J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129, FC (refd)

KC Mathews v Kumpulan Guthrie Sdn Bhd [1981] 2 MLJ 320; [1981] CLJ Rep 62, FC (refd)

Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd [1997] 1 MLJ 376; [1997] 3 CLJ 827, CA (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 1 LNS 907, FC (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1; [1997] 3 CLJ 235, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 53

T Thavalingam (Lee Hishamuddin Allen & Gledhill) for the applicant.
Azman Mohamed (Azam Idzham Azman & Partners) for the first respondent.

Aziah Ali J:

[1] This is an application for judicial review pursuant to O 53 of the Rules of the High Court 1980 for an order of certiorari to quash the award of the Industrial Court No 989 of 2009 dated 12 August 2009 which concluded that the dismissal of the first respondent was without just cause or excuse. I dismissed the application with costs of RM4,000 to the first respondent.

BACKGROUND

[2] The first respondent was appointed as Chief Operating Officer ('COO') of Malaysian Integrated Data Centre ('MIDC'), a business unit in the applicant company, with effect from 7 February 2001. Under his contract of employment the first respondent was accorded terms and conditions and benefits of an employee of the applicant. MIDC was a business model in which the applicant would seek potential partners to provide funding and technological knowledge with equity sharing granted to the partners.

[3] By a letter dated 6 February 2001 the first respondent was required to report to the Group Managing Director of the Company and that he would be granted six months to ascertain the requirements of the position as well as to inform the Group Human Resource of his readiness to assume the overall responsibilities for the MIDC from its current incumbent, Mr Paul Michael Smith ('Paul Smith'), who was expected to leave in six months. Paul Smith was hired on a contract basis for one year. Both the first respondent and Paul Smith were 'special grade' employees and both were paid a salary of RM26,000 per month.

[4] Prior to his employment with the applicant, the first respondent has had 15 years' of experience in information technology with various companies such as Sapura Advanced System, Siemens Nixdorf International Bhd and Hewlett Packard. According to the Group Human Resource Director ('COW1') apart from the appointment as COO of MIDC, the first respondent was also expected to contribute to enhance the applicant's performance.

[5] While working for MIDC, on 19 February 2001 the first respondent was given the added function of overseeing the Information Technology Division, another division within the applicant but separate from MIDC pending the appointment of a suitable candidate. The first respondent was also appointed to oversee a project known as timegold premium project and also another project called virtual storage on demand ('VSOD'). At the regular meetings of the applicant, the progress of MIDC was minuted. On 20 June 2001 the first respondent made a presentation to the applicant's Board of Directors on 'a

proposal on new investment in MIDC'. Subsequent to the meeting the Applicant sent the first respondent to the United States of America ('USA') in connection with work for MIDC and VSOD. The first applicant returned from the USA on 15 July 2001.

[6] Upon his return there were several changes in the applicant's management. During his trip to the USA, Tan Sri Halim Saad was no longer the applicant's Group Managing Director. He was replaced by COW2. COW1 the Group Human Resource Director also left some time in July 2001. Her position was then taken up by COW3.

[7] By letter dated 3 August 2001 the first respondent informed the applicant of his readiness to assume the overall responsibilities of MIDC. However by a letter dated 14 September 2001, ie approximately seven months after joining the applicant, the first respondent's employment was terminated with two weeks' salary in lieu of notice in accordance with cl 4.1 of his letter of appointment dated 5 February 2001 ('exh SMS3'). According to COW2, the Group CEO of the applicant and who signed the first respondent's letter of termination, the applicant's Board of Directors did not wish to proceed with the proposal for an MIDC and to close down MIDC effective 1 October 2001. COW1 said that the first respondent was given two weeks' notice of termination of employment because he was an unconfirmed probationer.

[8] The first respondent contends that his dismissal was without just cause or excuse and/or in breach of the principle of natural justice and/or an unfair labour practice and/or an unlawful and/or colorable exercise or an act of mala fide of the applicant's management.

[9] The issues before the Industrial Court are as follows:

(a) whether the first respondent was a probationer at the time of termination of his service; and

(b) whether the termination of the first respondent's service was without just cause and/or excuse.

WHETHER THE FIRST RESPONDENT WAS A PROBATIONER

[10] Counsel for the applicant refers to cl 3 of the first respondent's letter of appointment which states that the first respondent's probationary period was six months. The applicant claims that the first respondent was never confirmed in his appointment. Counsel submits that when an employee is appointed on probation he continues to be a probationer even after the period of probation expires if the employer did not take action to either confirm or terminate his appointment (*KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320;

[1981] CLJ Rep 62). It is submitted that the Industrial Court failed to consider that the first respondent was a probationer and the Industrial Court has acted on an incorrect basis of fact and has erred in law when it found that the applicant had, by conduct, treated the first respondent not as a probationer. It is submitted that the mere fact that the first respondent was sent on a business trip to the USA did not make him automatically a confirmed employee. For the first respondent it is submitted that an exception to the general rule is where the employer treats the employee like a confirmed employee, then the company is deemed to have taken the position that the employee is no longer a probationer (*Abdul Majid bin Hj Nazardin & Ors v Paari Perumal* [2002] 2 MLJ 640; [2002] 3 CLJ 133). Counsel submits that the first respondent's position as COO of MIDC was not in fact as a probationer and the probationary period in the first respondent's letter of appointment was merely a formality to be fulfilled. It is submitted that the Industrial Court has considered the evidence adduced and found that the applicant had not treated the first respondent as a probationer.

[11] The Industrial Court found that by conduct the applicant had treated the first respondent as a confirmed employee for the following reasons:

(a) the first respondent joined the applicant at the invitation of the then Managing Director Tan Sri Halim Saad;

(b) the first respondent was not a novice but an expert with 15 years' experience in the IT field and his qualification and experience were duly recognised by the applicant;

(c) no review was conducted by the applicant to assess the performance and suitability of the first respondent for permanent employment or to continue to serve a further probation period;

(d) the applicant's letter giving the first respondent six months to ascertain the requirement of his position and to inform the Group Human Resources of his readiness to take over the responsibility from Paul Smith indicate the applicant's full confidence of the first respondent's capability;

(e) the issue of the first respondent's capability does not arise due to the fact that the applicant gave him additional responsibilities; and

(f) the minutes of the applicant's board meeting on 24 August 2001 show that the applicant treated the first respondent as a permanent employee when it is minuted as follows:

> The CEO was requested to examine means of exiting and in particular to handle the two main employees working for this new business tactfully, one is a contracted employee and the second one is *a permanent employee* of the Company.

[12] COW2 testified that at the Board meeting on 24 August 2001 it was

determined that two special grade employees would be terminated, one by terminating the contract with a private company and the other by terminating the employment of a person designated as COO of MIDC. The Industrial Court found as a fact that the 'contracted employee' refers to Paul Smith and the 'permanent employee' refers to the first respondent. I find this finding supported by the testimony of COW2 and the evidence of the minutes of the Board meeting which show that the Board acknowledged the status of the first respondent as a permanent employee. Therefore the Industrial Court has committed no error in finding that the first respondent was treated as a permanent employee. Even if the first respondent had been found to be a probationer, the right of an employee on probation not to be dismissed without just cause or excuse is settled law. In the case of *Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd* [1997] 1 MLJ 376; [1997] 3 CLJ 827, Shaik Daud JCA in delivering the judgment of the Court of Appeal said at p 379 (MLJ) p 831 (CLJ):

> It is our view that an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of bona fides is essential in the dismissal of an employee on probation, but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or is a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal.

WHETHER THE TERMINATION OF THE FIRST RESPONDENT'S SERVICE WAS WITHOUT JUST CAUSE AND/OR EXCUSE

[13] It is submitted for the applicant that there was a surplus of employees as a result of the closure of MIDC. Therefore the termination of the first respondent was effected in good faith. Counsel for the applicant submits that the Industrial Court failed to recognise the established principle that the right to reorganise a business is a management prerogative and the court would not interfere in the same unless it is shown that the reorganisation was effected in bad faith. The motive for the closure of a business is not a relevant consideration. Counsel submits that the Board meeting on 24 August 2001 and 5 September 2001 documented the closure of MIDC. Further the CEO/SG was also terminated and not just the first respondent. Therefore it is submitted that the Industrial Court erred and failed to take into account that evidence was adduced to establish that a decision was made to close down MIDC effective 1 October 2001. Counsel submits that the Industrial Court has erred when it found that the applicant has failed to prove the non-viability of MIDC and justify its closure. For the first respondent counsel submits that the burden is on the applicant to prove that the closure of MIDC was justified and bona fide. It is submitted that no evidence was produced to support the applicant's contention that the closure of MIDC was because it was not viable.

The report by the consultant that MIDC was not viable and the actual minutes of the Board meetings were not produced and neither was the person who recorded the minutes called. The minutes of the Board meetings relied on by the applicant were incomplete and unsigned. What was produced appears to be a summary of the minutes. Counsel refers to the minutes of the Board meeting on 5 September 2001 which show that only Paul Smith and the first respondent would be terminated but other employees would be redeployed. Counsel submits that if MIDC was a risky business and not viable then why was the first respondent sent to the USA in July 2001? The whole exercise of closure took place rapidly at just about the time when the first respondent was to take over from Paul Smith. It is submitted that the decision to close down MIDC was capricious and in bad faith based on the fact that in August 2001 after the first respondent returned from the USA, he stumbled upon a new set of call cards designating Paul Smith as CEO. It is submitted that for reasons best known to the applicant, they did not wish for the first respondent to take over from the incumbent as scheduled and therefore raised the issue of the non-viability of MIDC in order to terminate the first respondent. Counsel submits that the Industrial Court has not committed any error and has carefully considered the evidence and found that in the absence of documentary proof as to the advice given by the consultant that MIDC was not viable, the applicant has failed to prove the non-viability of MIDC to justify its closure.

[14] In *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129 the court said, inter alia:

> Where representations are made and are referred to the Industrial Court for enquiry it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse has or has not been made out. If it finds as a fact that it has not been proved then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court of the High Court cannot go into another reason not relied on by the employer or find one for it.

The reason advanced by the applicant to justify the termination of the first respondent's employment is redundancy due to its decision to close down MIDC. The applicant contends that as a result of the closure of MIDC all employees including the first respondent became surplus. The termination was not linked to his performance. According to the applicant attempts to find alternative employment for the first respondent commensurate with his qualifications, experience, skills and salary proved futile. Therefore it is contended that the applicant had no other alternative but to terminate the first respondent's services.

[15] The Industrial Court found that the first respondent's job functions has not ceased to exist due to the closure of MIDC for the following reasons:

(a) cl 2 of the first respondent's letter of appointment shows that the first respondent was not appointed solely for the purpose of MIDC but it provides that the applicant reserves the right to assign him any work or transfer him to any present or future branch, station, division, department, subsidiary or associated company within the Renong Group of Companies as it deems fit without any geographical limits;

(b) the applicant had assigned to the first respondent additional responsibilities which were as important as his function as COO of MIDC which shows that the first respondent's job functions were not limited to MIDC only;

(c) the applicant has failed to show what happened to these other job functions assigned to the first respondent upon the closure of MIDC and in the absence of cogent evidence the Industrial Court deems the posts had been left vacant; and

(d) there is no evidence of the total number of employees rendered redundant and the strength of the management of MIDC to enable the Industrial Court to determine whether employees in general or the first respondent in particular became redundant.

[16] I find that the Industrial Court has properly examined the evidence adduced by the applicant in support of its contention that the first respondent became redundant due to the decision to close down MIDC. The award shows that the Industrial Court found that the applicant has failed to produce sufficient documentary proof that MIDC was not viable. The Industrial Court found that the managerial power to retrench was not exercised bona fide due to the many unanswered questions relating to the closure of MIDC particularly as to when exactly did the Board found that MIDC was not viable. In the absence of proof the Industrial Court found that the contention that MIDC was not viable is without basis. Further the Industrial Court found element of mala fide when the applicant failed to respond to the first respondent's queries about his readiness to assume responsibility for MIDC and the queries on why Paul Smith was issuing call cards and documents claiming to be the CEO of MIDC. The Industrial Court accepted the first respondent's evidence that he was not informed or explained about the closure of MIDC and therefore the applicant has failed to comply with the accepted norms and principles of good industrial relations practice. The Industrial Court also found that the failure of the applicant to give adequate notice to the first respondent of the impending closure of MIDC and the retrenchment indicated that the retrenchment was not genuine. On the evidence the Industrial Court found that on a balance of probabilities the dismissal of the first respondent on the ground of redundancy has not been established and his dismissal was without just cause or excuse.

[17] In the case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 1 LNS 907 the Federal Court said, inter alia:

> The Federal Court, in *Petroleum National Bhd v Nik Ramli* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the Rama Chandran approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

Having considered the reasons on which the Industrial Court arrived at its findings, I am unable to agree with counsel for the applicant that the Industrial Court has made its decision based on an incorrect basis of fact. The award shows that the Industrial Court has considered the relevant facts. It cannot be said that the findings are irrational and not supported by evidence. Therefore I find no reason to disturb the findings. In *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235 (CA) the court said:

> The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it.

I find that the Industrial Court has considered all the relevant facts and evidence in concluding that the applicant has failed to prove redundancy to justify the dismissal of the first respondent. I do not find any error of law committed by the Industrial Court that warrants curial intervention. For the reasons stated the application is dismissed with costs of RM4,000 to the first respondent.

Application dismissed with costs.

Reported by Ashok Kumar